



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO 161 OF 2017

DAVID KIOGORA KIRIMANIA.....PLAINTIFF

VERSUS

MURINGU MUCHAI IKABU.....1ST DEFENDANT

PETER MAINA.....2ND DEFENDANT

RULING

BACKGROUND

1. The notice of motion dated 19.6.2017 is seeking for orders directing defendants to furnish security. There is also a prayer for injunction restraining defendants from mining on the suit land (Abothuguchi/Ruiru/927). 1st defendant is apparently the registered owner of the suit land.

2. Vide an agreement of 13.1.2016, 1st defendant leased to the plaintiff the suit land for purposes of excavating stones. An addendum agreement was further made on 1.7.2016. The contract appears to have hit the rocks since by the time this suit was filed, the land had been leased to 2nd defendant.

Plaintiff's Case

3. The applicant's case is premised on the grounds appearing on the face of the application along with his supporting affidavit filed on 23.6.2017.

4. Applicant avers that when they made the agreement with 1st defendant, he took over possession of the site on the suit land. He then started excavating stones, sold them and paid 1st defendant as per their agreement. Plaintiff avers that at some point, his machines broke down and he faced difficulties in getting the spare parts for the machines. He duly informed the 1st defendant that he would resume excavation immediately he got another machine.

5. Plaintiff avers that in breach of their agreement, 1st defendant unilaterally proceeded to terminate the contract and he also brought 2nd defendant to replace plaintiff on site.

6. Plaintiff avers that the exercise of stone excavation is finite and once the stones are depleted, the site is abandoned. It is against this background that plaintiff desires to have the defendant ordered to furnish security or an injunction be issued to preserve the suit land.

7. In support of his case, plaintiff has proffered the following authorities:

(i) Panari versus Mrs. Lijoodi & 2 others (Nai. ELC 779/2013)

(ii) James Thungu versus County Government of Transzoia and 2 others (Kitale ELC No. 31 of 2015).

(iii) Mrao versus First American Bank & 2 Others.

(iv) Tritex Industries LTD & 3 others versus National Housing Corporation & Another (Mombasa HCCC No. 8 of 2011).

Case for defendants

8. In response to the application, defendants have relied on the affidavits of 1st defendant, the one filed on 17.10.2017 and the one filed on 30.5.2017.

9. The existence of the two agreements is admitted by defendants. However, 1st defendant avers that plaintiff failed to make payments as per the agreement and he also carted away his machinery thus breaking the agreement. 1st defendant issued demand letters to the plaintiff accordingly. The same have been availed as annexures.

10. Defendants aver that applicant has approached the court with unclean hands as he wants an injunction to restrain the respondents from utilizing their resources.

11. In support of their case, the respondents have proffered the following authorities;

- (i) Alghussein Establishment versus Eton College (1991) 1 All ER pp 267.
- (ii) Aida Nunes versus J.M.N Njonjo & C. Kigwe (1962) EA page 89.
- (iii) Joseph Wachira Wamuru versus Savings & Loan (K) Ltd (2010) eKLR
- (iv) National Bank of Kenya LTD versus Pipelastik Samkolit (K) Ltd and Another (2002) EA 503.
- (v) Nakana Trading Co. Ltd versus Coffee Marketing Board 1990 – 1994 EA 448.
- (vi) Edward Mugambi versus Jason Mathiu (2007) eKLR.
- (vii) Purple Rose Trading Company Limited versus Bhanoo Shashikant Jai (2014) eKLR.
- (viii) Fina Bank Ltd versus Spares and Industries Ltd (2000) 1 EA 52
- (ix) Apollo Onyango Njago & another versus Savings & Loan Kenya Limited (2012) eKLR.

Determination

12. The law applicable to the granting of an interlocutory injunction is provided for under order 40 rule (1) of the Civil Procedure Rules 2010 where it is provided that that; ***“Where in any suit it is proved by affidavit or otherwise that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit. The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.***

13. This legal position was interpreted and settled in the case of **Giella versus Cassman Brown and Co. Ltd (1973) E.A 358** where it was stipulated that ***“.....first an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, it will decide the application on the balance of convenience”.***

14. In **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others (2003) KLR 125** it was held that; ***“A prima facie case is more than an arguable case”.*** It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the applicant’s case succeeding upon trial. That is clearly a standard which is higher than an arguable case.

15. In the present case, applicant has deponed in paragraph 3 of his supporting affidavit that ***“I am abundantly familiar with the defendant who owns the parcel of land and the 2nd defendant who has replaced me on the suit land”.***

16. The plaintiff is therefore aware that excavation has going on by the time he was filling this suit. What is there to be preserved if mining has been ongoing. A court should only give orders which are capable of being enforced. The applicant has not made any request for a site visit or an assessment of the status of the suit land. The court would not be in a position to know what is in existence which is capable of being preserved. In the circumstances, i find that applicant has not demonstrated that he has a prima facie case.

17. On the averment that applicant stands to suffer irreparable damage because the stones may be depleted, I find that applicant has actually sought for ***“compensation for lost earnings”*** in the plaint. It follows that an award of damages can suffice.

18. On balance of convenience, I find that this is a case where by applicant is no longer on the site. In his own admission, Applicant was replaced by 2nd respondent. Applicant avers that he was evicted by the 1st respondent whereas 1st respondent avers that it is applicant who abandoned the site. There is an admission by the applicant that he did stop excavation at some point as his machines broke down. He avers that he informed the 1st respondent that he would resume excavation the moment he got another machine.

19. The two agreements do not make a provision as to what was to happen in such a scenario. However I have seen no confirmation from the applicant to indicate that his machines are now operational. Against this background, the court cannot know the circumstances, under which applicant left the site (whether he abandoned the same or was evicted). What is evident is that someone else has been on the site for quite some time. Issuing an order of injunction at this stage would now amount to eviction of 2nd respondent. The balance of convenience is hence not in favour of the applicant.

20. As rightly submitted by the respondents, an injunction is a discretionary remedy. In the case of **Charter house investment Ltd vs Simon K. Sang & 3 Others (2010) eKLR** the court of appeal had observed that; ***“Injunction is an equitable and discretionary remedy.... the award of temporary injunction by a court of equity has never been guaranteed as a matter of right”***.

21. In the case cited by respondents **Apollo Onyango Njago & another versus Savings & Loan Kenya Ltd (2012) eKLR**, a quote was made in **Hassan Zubeidi versus Patrick Mwangangi Kibaiya & Another (2014) eKLR** where it was held that; ***“..... Injunction is both discretionary and equitable remedy. It therefore behooves a person seeking it to conduct himself in a manner that the court will not disapprove both before and after the filing of the application. He must be open and candid to court. He should not hide anything, must play above board and should not be found wanting in material non-disclosure”***.

22. Applicant is crying foul in the manner the defendants are handling the suit citing inordinate delay in filing a response to the application. True, the respondents delayed in filing a response whereby the court had to intervene to allow them (respondents) to file their replying affidavits out of time vide my ruling of 17.10.2017. However, applicant has failed to disclose his own wanting conduct in the matter. An application was filed by the applicant under a certificate of urgency on 22.5.2017. The same was scheduled for hearing on 31.5.2017 but there was no appearance. The court took out the matter from the day’s cause list. That application was not prosecuted again, instead it was withdrawn on 26.6.2017. The present application was then filed on 23.6.2017. Applicant has stated that stone excavation is a finite exercise, so he knew that time was of essence yet he chose to file an application after another.

23. The status of the parties as at now is that the contract between the plaintiff and 1st defendant has broken down. As to who breached the contract and as to whether the contract is still enforceable is an issue that invites arguments. On this note, I need not re-invent the wheel. In **Mbuthia versus Jimba Credit Corporation and another 1988 KLR**, it was held that; ***“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side’s propositions. The lower court judge had gone beyond his proper duties and made final findings of fact on disputed affidavits.”***

24. The court cannot purport to interpret the contract of the parties at this stage. There was no provision for security in the two agreements. Applicant desires the defendants to furnish security yet he himself has not given his undertaking on the losses that will befall the defendants if injunction and or order to furnish security is given. Furthermore, applicant has not been candid on whether he is in a position to carry out stone excavation or not. He stopped the exercise because his machines broke down. He has not stated whether he ever got his machines in working condition.

25. He who comes to equity must do equity. Land is a very sensitive and emotive subject. A party should not approach this subject in a sloppy manner. A party who does not place himself favorably before the eyes of equity cannot expect such favour. I have no doubts that the applicant is one such party.

26. I find that the orders sought by the applicant are unmerited. The application of 23.6.2017 is hereby dismissed with costs to respondents.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 18th APRIL, 2018

IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

H. Gitonga holding brief for Kamau for plaintiff/applicant – present

Munene for defendant/respondent - present

HON. LUCY. N. MBUGUA

ELC JUDGE